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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963

[redacted] 107

COFFEE COUNTY, TENNESSEE,
Petitioner,

v.

CITY OF TULLAHOMA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 1137.

COFFEE COUNTY, TENNESSEE,
Petitioner,

v.

CITY OF TULLAHOMA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The Opinion of the District Court is reported at 204 F. Supp. 794. The Opinions of the Court of Appeals for the Sixth Circuit are reported at 328 F. 2d 683.

JURISDICTION.

Respondent does not dispute the jurisdiction of this Court under 28 U. S. C., Section 1254 (1), but does deny that there are special and important reasons for granting writ of certiorari within the contemplation of this Court's Rule 19.

QUESTION PRESENTED.

Does the Tennessee Valley Authority Act of 1933, as amended, (a) obligate a city operating its own electric distribution system and purchasing power from Tennessee Valley Authority to pay to the county in which the city operates all moneys which the city takes from its distribution system and places in its general fund and which are calculated by applying the county tax rate to the value of the electric distribution properties; and (b) also obligate Tennessee Valley Authority in its contracts with cities for their purchase of electric power to include provisions implementing such statutory obligation?

STATUTE INVOLVED.

The statutory provision involved is the fourth paragraph of Section 13 of the Tennessee Valley Authority Act of 1933, as amended in 1940 (16 U. S. C., Sec. 831 L). Said provision is quoted hereinafter at p. 5 and also in the Petition.

STATEMENT OF THE CASE.

The Opinion of the Court of Appeals contains an adequate and accurate Statement of the Case, which Respondent hereby adopts without reiteration. If any fact not included in such statement is hereinafter stated, it will be undisputed in the Record and appropriate citation to the Appendix in the Court of Appeals will be made.

REASONS FOR DENYING THE WRIT.

1. There is not presented an important question of federal law which needs to be settled by this Court, but rather a situation where a United States Circuit Court and a federal agency have agreed as to the proper interpretation of a federal statute being administered by the agency.

2. The Court of Appeals for the Sixth Circuit correctly decided the only question presented.

SUMMARY OF ARGUMENT.

An amendment adopted in 1940 to the Tennessee Valley Authority Act of 1933 was intended primarily to make clear that the same amendment when dealing with payments of tax equivalent by the Tennessee Valley Authority to states and counties should not be construed to impair or interfere with the Authority's existing discretion under the other provision to permit or provide for such tax equivalent payments by a municipality and to preserve and continue intact discretion of the Authority pursuant to which it had uniformly left the matter of distribution of tax equivalents between counties and cities entirely to states or municipalities concerned.

The Authority has no duty with reference to proper distribution by a municipality of tax equivalent payments received by it from its electric distribution system, and such distribution is to be determined exclusively by the state itself. In the absence of action by the state, the municipality is entitled to retain the entire fund representing tax equivalent payments, so that no action based on federal law lies on the part of the county to recover all or any portion of such payments.

Congress in enacting the Tennessee Valley Authority Act and amendments thereto was not attempting to change the basic relationship between the federal and state governments. The provision in the Authority's power contracts covering tax equivalent payments by the municipal electric distributor to the municipality is not a grant of authority by the Authority to the municipality. Such provision is a limitation which the municipality voluntarily accepts on the use which it can make of its own revenues and in the absence of this limitation the municipality could divert any surplus power revenues it wished to its general funds.

The background and legislative history of the amendment in 1940 to the Tennessee Valley Authority Act supports the interpretation thereof adopted by the majority opinion of the Court of Appeals and hereinabove outlined. Such legislative history is an accepted aid in the interpretation of a federal statute and frequently is determinative of its meaning. An ambiguous floor amendment to a bill will not be construed as giving the bill a broader meaning than was indicated by the original version, or by the committee report or by the floor debate.

The statutory amendment under consideration has been given a consistent and long-continued interpretation by the federal agency charged with its administration which is in accord with the interpretation thereof by the Court of Appeals. Such administrative interpretation of the statute is important and entitled to considerable weight.

Where the interpretation of the statute by the administrative agency was reported to Congress in accordance with a specific statutory directive and such interpretation has been brought to the attention of Congress repeatedly by annual reports of the agency, failure of Congress to act over a long period is an important, if not controlling, factor in support of the interpretation adopted by the administrative agency.

ARGUMENT.

The question in this case turns upon a single paragraph, being part of an amendment adopted in 1940 completely rewriting Section 13 of the Tennessee Valley Authority Act of 1933, 16 U. S. C. A., Section 831 L, as follows:

> "Nothing herein shall be construed to limit the authority of the Corporation in its contracts for the sale of power to municipalities, to permit or provide for the resale of power at rates which may include an amount to cover tax equivalent payments to the municipality in lieu of State, county and municipal taxes upon any distribution system, or property owned by the municipality, or any agency thereof, conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of State or county taxes upon any such distribution system or property; it being the intention of Congress that either the municipality or the State in which the municipality is situated shall provide for the proper distribution to the State and county of any portion of tax equivalent so collected by the municipality in lieu of State or County taxes upon any such distribution system or property."

The opinion of the United States Court of Appeals is a clear and cogent statement of convincing reasons for the interpretation of such statutory provision which the opinion adopts and expounds. Such amendment was intended primarily to make clear that the same amendment in dealing with payments of tax equivalents by Tennessee Valley Authority to states and counties should not be construed to impair or interfere with the Authority's existing discretion under other provisions to permit or provide for such tax equivalent payments by municipality and to preserve and continue intact discretion of the Authority pur-

suant to which it had uniformly left the matter of distribution of tax equivalents between cities and counties to states or municipalities concerned.

Under this interpretation, TVA has no duty with reference to the proper distribution by a municipality of tax equivalent payments received by it from its electric distribution system and such distribution is to be determined exclusively by the state or by the municipality itself; and in the absence of action by the state itself, the municipality is entitled to retain the entire fund representing tax equivalent payments, so that no action lies on the part of the county to recover any part of such payments. To such opinion we add only the following comments:

The Philosophy of the TVA Act.

Congress, in enacting the TVA Act, was not attempting to change the basic relationship between the federal and state governments. The contracts under which TVA sells power to municipalities are wholesale power-supply contracts entered into at arm's length. The validity of such a contract is dependent, not only on the authority conferred upon TVA by federal law, but also on a grant of the necessary authority to the municipality under state law; the municipality is a creature of the state, and in entering into such a contract it exercises authority granted to it by the state. TVA may decline to sell power if a municipality is unwilling or unable to accept the conditions which TVA considers necessary to accomplish the congressional objectives, but it cannot require a municipality to accept such provisions nor can it require the state to permit their acceptance. See **City of Middlesboro v. Kentucky Utilities Co.**, 146 S. W. 2d 48 (Ky. 1940); **Johnson v. State**, 128 S. E. 2d 651 (Ga. App. 1962).

The power generated at the various TVA installations is property of the United States within the meaning of

the property clause of the Constitution[1] **Ashwander v. Tennessee Valley Authority,** 297 U. S. 288 (1936). In the TVA Act Congress authorized TVA to dispose of this power for the benefit of the people of the section as a whole. This was to be accomplished by distributing power at the lowest possible rates in such manner as to increase the domestic and rural use of electricity (TVA Act, Sec. 11). Electric power was recognized as a tool to be used for the economic and social development of the area (**Cf.** TVA Act, Sec. 22). To accomplish the objectives of the act, Congress gave the TVA Board broad discretion as to the provisions which it might include in its wholesale power contracts. Thus section 10 authorizes the Board to include in contracts for the sale of power "such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as **in its judgment** may be necessary or desirable for carrying out the purposes of this Act." (Emphasis added.)

One of the historical problems of municipal distribution of electric power has been the pressure to maintain high rates and drain off the revenues for general municipal purposes. Congress recognized that it was necessary to authorize the TVA Board to include in its contracts provisions which would prevent this from being done if its purpose of bringing about expanding use of electric power through low rates was to be accomplished, but Congress left the TVA Board free to determine what type of contractual provisions should be used. TVA elected to include limitations on the use which a municipality might make of its power revenues, but it was under no compulsion to do so. It might appropriately have decided that limitations on resale rates were, of themselves, adequate

[1] "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States" (Art. IV, Sec. 3, cl. 2).

to prevent the dissipation of revenues, and that it should accordingly enter into contracts which did not restrict in any way the rights of the municipalities to use their revenues. If this course had been followed there would be no dollars of municipal power revenues earmarked for in-lieu tax payments. Would a court then feel called upon to determine what amount should be considered to be in-lieu tax payments and allocate that amount between payments in lieu of city taxes and payments in lieu of county taxes? And what would happen if the rates produced surplus revenues beyond the amount which the court considered to be proper for in-lieu tax payments? Would the court decree some kind of allocation of the excess amounts between the state and the county?

It seems to us that these questions answer themselves. The provision in TVA's power contracts covering in-lieu tax payments is not a grant of authority by TVA to the municipality. It is a limitation which the municipality voluntarily accepts on the use which it can make of its own revenues. In the absence of this limitation, the city could divert any surplus power revenues it wished to its general funds without earmarking any portion as in lieu of taxes or giving any consideration to whether it was taking more or less than a reasonable amount in lieu of taxes. This, indeed, was the course which had been followed by Tullahoma and other municipalities which operated their own distribution systems before they contracted to obtain power from TVA.

A construction of section 13 which would require that TVA compel municipalities to make in-lieu tax payments to counties would do violence to a basic principle underlying the TVA Act—that the TVA Board should be entrusted with broad discretion in effectuating congressional policies and then held accountable for results. Only in rare instances does the act use mandatory language. In-

stead, Congress has set out the general objectives and policies which it wishes the TVA Board to effectuate, but it has left to the TVA Board wide discretion as to the use of means.[2]

TVA was created to work for the development of the natural resources of the region in cooperation with state and local agencies[3] and its Board of Directors has always been acutely conscious of the importance of not intruding in matters which are essentially the concern of state or local interests. In such matters TVA's function is to furnish advice and technical assistance, to suggest what might be done, but not to interfere with the right of local people to make their own decisions.

As was said in brief of the Tennessee Valley Authority filed as *amicus curiae* in the Court of Appeals:

> ". . . TVA has urged municipalities to make a reasonable distribution of tax-equivalent payments. It has also encouraged the municipalities and counties to seek legislation providing for an equitable distribution of such payments. It has not considered, however, that it should try to dictate to a municipality what is a proper distribution or to require that such distribution be made. The TVA Board feels very strongly that any such action on its part would be an intrusion

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[2] As stated by the House members of the congressional conference committee which wrote the final version of the original TVA Act: "We are fully persuaded that the full success of the Tennessee Valley development project will depend more upon the ability, vision, and executive capacity of the members of the board than upon legislative provisions. We have sought to set up a legislative framework, but not to encase it in a legislative straitjacket. . . . We have indicated the course it shall take, but have not directed the particular steps it shall make" (H. R. Rep. No. 130, 73d Cong., 1st Sess. 19 (1933)). Cf. *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U. S. 546 (1946).

[3] See, for example, sections 5 (c), (e), 10, and 22 of the TVA Act.

into a matter which is properly one for determination by the State of Tennessee and its affected local subdivisions, and that such an intrusion by TVA would tend to disrupt the relationship of trust and confidence between TVA and the local distributors of electric power, on which the success of the power program so largely depends."

Background and Legislative History of the 1940 Amendment.

The provisions in TVA power contracts controlling the use of revenues by municipalities antedate the 1940 amendment. The in-lieu tax provision included in the contracts entered into prior to the 1940 amendment was basically the same as the one in the Tullahoma contract.

In TVA's contracts with municipalities, the specific purposes for which revenues may be used are set out and the municipality is required to use all surplus revenues as a basis for the reduction of rates. The standard form of contract has been revised from time to time through the years but the basic nature of these provisions has remained unchanged. Their purpose is to make certain that the revenues of the municipality do not find their way into extraneous channels but are used only for the operation of the electric system. The provisions dealing with in-lieu tax payments, as already noted, are not a grant of authority from TVA to the municipality but a limitation on the amount of money which can be taken into the general funds of the municipality.

Section 13 of the TVA Act, as originally enacted in 1933, provided only for in-lieu tax payments by TVA to the states of Alabama and Tennessee (48 Stat. 66). In 1939 TVA acquired various generating and transmission facilities of a number of private power companies, while at the same time distribution facilities

belonging to such companies were acquired by municipalities and cooperatives. The 1940 amendment to section 13 was an effort to provide for in-lieu tax payments **by TVA** which would be more equitable and more equitably distributed among and within the various states in which TVA operates.[4]

The original version of this legislation, contained in S. 2925 as originally introduced in the 75th Congress, provided that TVA should make payments only to the states, leaving to the states the function of distributing the payments among counties and other subdivisions (48a-51a, Amendment to TVA Act Proposed by S. 2925). This bill contained the following two paragraphs:

> The payments above provided shall in each case be made to the State not later than July 31 of each year, and it is the intention of the Congress that each State shall redistribute said payments or a portion thereof to counties and other local taxing districts affected by the program of the Corporations.
>
> It is likewise intended that each of the said States shall in like manner redistribute all payments made in lieu of taxation paid to municipalities by municipal authorities as provided in contracts made for the purchase of power from the Corporation (50a, Amendment to TVA Act Proposed by S. 2925).[5]

The first paragraph refers to the redistribution by the states of the payments made by TVA. Nowhere in the

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[4] "The object of the bill is to provide that the Tennessee Valley Authority shall pay in lieu of taxes on all property allocated to power an amount equal to what would be paid as taxes on said property if the same were privately owned" (54a, Excerpts from Committee Report on S. 2925).

[5] The clause "as provided in contracts made for the purchase of power from the Corporation" clearly modifies the word "paid" and not the word "redistribute". Such contracts contained no provision relating to redistribution (TVA-4-6, Contract with City of Athens).

bill was there any indication as to how these payments should be distributed and it was clearly the intent of its sponsor, Senator Norris, that the redistribution be left entirely to the discretion of the states. The second paragraph relates to municipal in-lieu tax payments, and it is equally clear that there was no intention to legislate as to the redistribution of these payments.

A subcommittee of the Senate Committee on Agriculture and Forestry, with Senator Norris (who introduced S. 2925) as Chairman, held a hearing with respect to S. 2925. At this hearing, in the course of colloquies Senator Norris made clear that it had always been "the real intention" of Congress that the states should divide with their political subdivisions the tax equivalents received by such states from TVA and that Congress also expected the states to pass laws with respect to the division of the "tax equivalents" which cities take from their municipal electric systems. He made clear that this, coupled with the earlier failure of the states to act, explained the admonitory features of S. 2925 (being the second paragraph of S. 2925 above quoted), that with respect to distribution or division of such tax equivalents Congress can declare "the intention of Congress", but it "cannot legislate on that, being a state matter." Mr. Fitts, then general counsel of TVA, expressed his agreement with Senator Norris.

At such hearing, Senator Norris also indicated his understanding that where the states do not require a municipality to divide its tax equivalents, then "the municipality naturally keeps it all" but, said Senator Norris, Congress "can put out of the picture" that matter because "the state has the power and the means" for dealing with it.

At the committee hearing another colloquy took place between Senator Norris and Mr. Lapsley, who was coun-

sel for the State Revenue Department of Alabama, as follows:

> Senator Norris: Nor the State either. Now, that is one of the difficulties we wanted to rectify and have put in this bill. While we cannot legislate on that, being a State matter, we have gone so far as to state in here that it is the intention of Congress, which we did not state originally—it is the intention of Congress to do that very thing.
>
> Mr. Lapsley. Well, Mr. Chairman, you state that it is the intention of Congress that the State shall do what I had in mind, but you do not express the intention of Congress that the cities with whom T. V. A. contracts shall do the same thing.
>
> Senator Norris: Oh, yes; the States could provide by statute that when any municipality received anything in lieu of taxation, it should be subdivided just the same as though it was taxes—which we cannot say (**Hearing on S. 2925 Before a Subcommittee of the Senate Committee on Agriculture and Forestry**, 76th Cong., 3d Sess. 33 (1940)).

Thus, again there was a colloquy demonstrating Senator Norris' conviction which he had earlier expressed that Congress could not legislate directly on the distribution of payments by municipalities.

As reported to the Senate from committee, the bill provided that a portion of the TVA payments should be made directly to the counties. This required elimination of the paragraph dealing with the redistribution of such payments by the states, and revision of the paragraph dealing with municipal tax-equivalent payments. The latter paragraph was revised to read as follows:[6]

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[6] To show changes made we have italicized the words which were added and marked through the words which were deleted.

> It is ~~likewise~~ intended *by Congress* that each of the said States shall ~~in like manner redistribute~~ *distribute* all payments made in lieu of taxation paid to municipalities by municipal authorities as provided in contracts made for the purchase of power from the Corporation (86 Cong. Rec. 5247 (1940)).

This revision was clearly not intended to change the meaning of the paragraph.

The language involved in this litigation was substituted for the language quoted above by an amendment offered on the floor of the Senate by Senator Hill of Alabama. The only discussion of the amendment when it was offered and adopted was the following:

> Mr. Hill: I understand that this amendment also is agreeable to the Senator from Nebraska.
>
> Mr. Norris: Yes; I see no objection to it, and in fact I think it is a very good amendment (Ibid.).

There was no debate and no indication that there was any understanding on the part of anyone that this language was intended to have any far-reaching effect. Prior to the acceptance of these amendments, Senator Norris received a letter from the general counsel of Tennessee Valley Authority advising him that **"they in no way alter the substance of the bill as reported."**[7] The amendment was offered and accepted on the evident assumption that it presented no policy or legislative problem worthy of being called to the attention of the Senate (Cong. Rec., Vol. 86, Part 5, p. 5247, April 30, 1940). Petitioner makes no contention, and there would be no basis for such contention if made, that any language or provision in the original TVA Act or in S. 2925 prior to this "minor per-

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[7] The complete letter, dated April 3, 1940, is quoted on Page 11 of the Petition for the Writ herein filed.

fecting" amendment obligated a municipality operating its own electric system and purchasing power from TVA to make any payment or distribution of its moneys to a county. Prior to the adoption of S. 2925, with its minor perfecting amendments, the sponsor of the bill and chairman of the sub-committee which recommended such amendments was advised by TVA's general counsel that they did not alter the substance of the bill and the bill without this amendment cannot be interpreted as Petitioner now contends for.

When the committee recommended S. 2925 for passage, it filed a committee report referring to the object of the bill as requiring payments by TVA. It analyzed the bill, step by step, pointing out all changes in existing laws and nowhere did the report state or intimate that the bill changed the existing law so as to require cities to share their revenues with counties.

H. R. 7424, the House counterpart of S. 2925, was not considered on the floor of the House of Representatives for the reason that the House Committee on Military Affairs, after hearing, voted to table this legislation (Hearings before the Committee on Military Affairs, House of Representatives, 76th Congress, 3rd Sess., on H. R. 7424 and other bills to amend the TVA Act of 1933, January and February, 1940). Thereupon the Senate Appropriations Committee included the language of S. 2925 as previously passed by the Senate, including the amendment offered by Senator Hill, as a rider (Section 39) to the Emergency Relief Appropriations Act, 1941.

Before the subcommittee of the Committee on Appropriations which was considering the Emergency Relief Appropriation Act, 1941, numerous Senators and Representatives testified in support of inclusion of the language of S. 2925, but not one even mentioned the problem of muni-

cipal tax distribution or referred to the paragraph added on this subject (Hearing before the Senate Committee on Appropriations, 76th Cong., 3rd Sess., on H. J. Res. 544, pages 149-162, May 30, 1940). The report of the Senate Committee on Appropriations made no reference to the paragraph added by Senator Hill's amendment, but merely described the new section as authorizing "the Tennessee Valley Authority to make payments to certain States and local governments in lieu of taxation from the gross proceeds derived by the Corporation" (Report No. 1754, Calendar No. 1840, Senate Committee on Appropriations, 76th Congress, 3rd Sess., June 5, 1940, p. 9).

The Senate passed the Emergency Relief Appropriations Act, 1941, without any discussion of Section 39 (Cong. Rec., Vol. 86, Part 5, p. 8076, June 12, 1940). When Section 39 of the Emergency Relief Appropriations Act, 1941, was discussed in the House, discussion was confined to tax equivalent payments by TVA itself (Cong. Rec., Vol. 86, Part 8, p. 8868, June 21, 1940).

It thus appears that at no stage in the history of this legislation was either House of Congress or any committee apprised that there was any contemplation that the language it was adopting would constitute a mandate to the cities purchasing power from TVA to make payments to the counties in which they operated electric systems.

To such situation the holding of this Court in **United States v. American Trucking Assn.**, 310 U. S. 534, 546-549 is applicable where the effort was made and rejected to construe a floor amendment as giving a bill a broader meaning than the original version or the Committee report or the floor debate indicated.

The Opinion of the Court of Appeals summarizes its conclusion as to legislative history, thus:

> "It thus would appear that the sponsors of the amendment had no thought or intention that Congress

itself was directly legislating to impose mandatorily on TVA, or upon the states or municipalities, the duty or obligation to provide for distribution of municipal in lieu tax payments to the counties. As Senator Norris clearly stated, it was his view that Congress could not so legislate and that this was a matter of local or state control. If the amendment presented on the Senate floor, which was finally enacted, had been intended to have a different and more far-reaching effect to the extent that Congress itself should directly legislate to impose duties in this respect, it seems obvious that Senator Norris would not have stated that 'it is a very good amendment,' and Senator Hill would not have described it as a 'minor perfecting' amendment."

Language of the Paragraph Here Involved.

It will be noted that the single paragraph upon which Petitioner relies in the lengthy amendatory act of 1940 begins with the words "Nothing herein shall be construed to limit the authority of (TVA)." It is a grammatical impossibility to find in a sentence with such a beginning a mandatory requirement that cities shall share with counties revenues of municipal electric systems, and a limitation upon the power of TVA to make other contracts. Yet Petitioner must contend that the sentence which disclaims an intention to limit TVA is the one sentence which does so!

The authority of TVA which is not to be construed as limited is the authority to make contracts which "**permit or provide** for the resale of power at rates which may include an amount to cover tax equivalent payments . . ." TVA is not directed to include resale rate schedules in its power contracts. TVA is not directed in any such resale rates schedules to require tax equivalents. The contracts

may **permit** such re-sale rates or the contracts may **provide** for them. The entire discretion is left with TVA to exercise the full extent of authority previously given by Section 10, as amended.

The re-sale rates which TVA may "permit or provide for" are rates "which may include an amount to cover tax equivalent payments to the **municipality** in lieu of State, county and municipal taxes upon any distribution system . . ." **The tax equivalent payments dealt with by this paragraph are not tax equivalent payments to the State or to the county, but only tax equivalent payments to the municipality.**

There come next the words "conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of State or county taxes . . ." These words cannot be isolated from the context of which they are a part. TVA may provide for re-sale rate schedules which include tax equivalents. TVA may condition the inclusion of tax equivalents upon their proper distribution. This, we respectfully insist, is the grammatical import of the words used.

The essential point is that this paragraph does not define "proper distribution" to be "proportionate allocation." "Proper distribution" is general language which recognizes that some constituted authority must make a decision as to what is proper, that is, reasonable. The constituted authority in this situation is emphatically neither Congress nor TVA, but it is either the local government operating the electric distribution system (the City) or it is the State speaking through its legislative body.

The Act of Congress in which is included the paragraph under analysis recognizes as a specific part of this paragraph that proper distribution of the tax equivalent is the

right and function of either the State or the municipality and that this is a matter for local decision. Immediately following the phrase "conditioned upon a proper distribution" we have language clearly negating the suggestion that Congress was itself defining "proper distribution" or even was authorizing TVA to do so, as follows:

> "it being the intention of Congress that either the municipality or the State in which the municipality is situated shall provide for the proper distribution" (of the tax equivalent).

Administrative and Contemporaneous Interpretation.

The interpretation given a statute by those charged with its administration is entitled to considerable weight. **County of Martin v. United States**, 356 U. S. 419; **Billings v. Truesdell**, 321 U. S. 542; **United States v. American Trucking Assn.**, 310 U. S. 534. The record leaves no escape from the conclusion which the Court of Appeals reached that TVA has consistently interpreted the amendment of 1940 to Section 13 in accordance with the views set forth in its Brief as *amicus curiae* in the Court of Appeals. See Appellant's Appendix in that Court, pages 5a, 19a-28a, 37a.

TVA, in its Brief as *amicus curiae* in the Court of Appeals, said:

> ". . . At that time, when the circumstances leading to its adoption were fresh in the minds of the TVA Board, the TVA Board construed this provision as a recognition by the Congress that the distribution of tax equivalents between a municipality and a county is a matter of state policy to be determined either by the state legislature, or, in the absence of state legislation, by the municipality itself; as notification by the Congress to the states and municipalities of its

views that such distribution should be made, and to the counties that they must seek relief through state and local channels rather than through the Congress; and as reaffirming TVA's authority to condition resale rates upon a proper distribution by the municipality of any amounts collected in lieu of state or county taxes but not, as was held by the court below, as directing TVA to include in its power contracts with municipalities provisions requiring such distribution.

"TVA has consistently adhered to this construction with the full knowledge and acquiescence of the Congress. . . ."

Also the following facts were established in the record:

1. In the negotiations by TVA with the cities concerning power contracts, the cities have been advised by representatives of TVA that they might retain all the tax equivalents if they wished.

2. Some of the cities which entered into contracts for TVA power previously operated their own distribution systems and in no case did these cities share their tax equivalents with counties. Generally, these cities, taking all tax equivalents possible under the TVA contract, including the so-called county tax equivalents, would receive less than they received prior to such contract.

3. Not one of the thirty-one municipal distributors in Alabama and in Mississippi share its tax equivalents with the respective county. Kentucky has a state statute which requires its cities to share their tax equivalents with their counties. Of the fifty-seven municipal distributors in Tennessee, twelve make a distribution to counties. Some of these act under special legislation which requires it. One, and only one, of the distributors is known to make a payment to the county without special legislation.

4. TVA in all of its power contracts with cities, except in Kentucky which has a state statute on the subject, permits the city to take the total tax equivalent and place the same in the city's general fund without sharing the same with the county.

The construction of the statute by TVA has also been clearly evidenced by a special report which it filed with Congress in December, 1944, and also by annual reports which it files with Congress covering TVA's operations during each fiscal year. The contents of such reports, to the extent not in the record, are subject to judicial notice. **Tempel v. United States**, 248 U. S. 121, 130; **Fletcher v. Jones**, 105 F. 2d 58, 61-62 (D. C. Cir. 1939); **Slack v. Atlantic White Tower System, Inc.**, 181 F. Supp. 124, 126 (D. Md. 1960).

The concluding paragraph of the 1940 Amendment to Section 13 of the TVA Act directs TVA, not later than January 1, 1945, to submit to Congress a report on the operation of its provisions. The report was entitled "Report on Section 13 of the TVA Act," was transmitted on December 22, 1944 by the TVA Board to the Congress and consisted of 136 pages devoted entirely to the background and operation of Section 13 as rewritten in 1940. Relevant excerpts from this report are printed in the record, Appellant's Appendix in Court of Appeals, pages 24a-26a.

Such report established the following facts: (a) TVA's interpretation of the amendatory act was (and consistently has been) in the absence of state legislation or special local agreements to the contrary, the entire tax equivalents may be kept, and usually are kept, by the municipality operating the distribution system; and (b) Congress, pursuant to its directive that it be informed by report from TVA concerning "the operation of the provisions of this

section" was advised of TVA's interpretation and of the practices of cities generally, and (c) Congress has acquiesced in such interpretation by failure to alter or amend the law subsequent to the required report.

Annual reports are filed by the TVA Board with Congress pursuant to an express requirement contained in section 9 (a) of the TVA Act. Section 14 of the act further requires that each such annual report contain copies of all power contracts entered into by TVA during the year. All of TVA's annual reports since 1940, except those for fiscal years 1942, 1952 and 1953, have contained copies of one or more power contracts with municipalities. These contracts, like the one involved in this case, include provisions clearly showing the TVA Board's construction of the relevant portion of section 13.

Congress, being thus advised in a special report and in successive annual reports of the TVA Board's construction, has never questioned it, and, although the TVA Act has been amended no less than seven times since 1940, Congress has taken no action to overturn TVA's construction of section 13.

CONCLUSION.

For the foregoing reasons it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Certificate of Service.

I certify that copy of this Brief has been served by mail on Petitioner's counsel of record in compliance with Rule 33 (1), this 1st day of July, 1964.

Edwin F. Hunt

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